

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANKLIN THOMAS OLIVA et al.,

Defendants and Appellants.

E035143

(Super.Ct.No. FVI 05979)

OPINION

APPEAL from the Superior Court of San Bernardino County. Larry W. Allen,
Judge. Affirmed.

Patrick J. Hennessey, under appointment by the Court of Appeal, for Defendant
and Appellant Frank Thomas Oliva.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and
Appellant Theresa Marie Ebert.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Scott C. Taylor, Supervising Deputy Attorney General, for Plaintiff and Respondent.

1. Introduction

In 1997, defendants Franklin Thomas Oliva and Theresa Marie Ebert were each charged with one count of cultivating marijuana in violation of Health and Safety Code section 11358; one count of unlawfully possessing marijuana in violation of Health and Safety Code section 11359; and two counts of endangering a child in violation of Penal Code section 273a, subdivision (b).¹ Oliva was separately charged with one count of attempted firearm removal and one count of battery on an officer in violation of sections 148, subdivision (a), and section 243, subdivision (c).

Oliva agreed to plead no contest to the one count of cultivating marijuana. The trial court denied Oliva's subsequent motion to withdraw his guilty plea and dismissed the other counts. Ebert also pleaded no contest to cultivating marijuana in exchange for dismissal of the other charges. In December 2003, more than six years after the incident occurred, the court sentenced both defendants to 36 months of probation with credit for time already served.

Both defendants challenge the trial court's denial of their suppression motion (§ 1538.5) and seek an independent review of the court's *Pitchess* rulings. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) Separately, defendant Oliva questions the trial

¹ All further statutory references are to the Penal Code unless stated otherwise.

court's refusal to allow him to use marijuana for medical purposes while on probation. (Health & Saf. Code, § 11362.5.)

2. Factual and Procedural Background

Because there was no trial, the facts are derived from the preliminary hearing.

One evening in March 1997, the San Bernardino County Sheriff's Department received reports of shots being fired and a woman screaming.

Deputy John Wickum responded and was directed to defendants' residence. Oliva refused Wickum's direction to step outside the fence surrounding the property. Oliva said there was no problem. Oliva explained the family had been setting off firecrackers. Wickum asked for permission to enter and Oliva gave his name and phone number. Wickum had the dispatcher call the phone number.

In response, Ebert, Oliva's co-habitant, and two small children came out of the house to the front of the property. Oliva prevented Ebert from opening the gate for the deputy. When Oliva grabbed the younger child and started returning to the house, Wickum jumped the fence and followed him. Wickum drew his pepper spray and ordered Oliva to put the child down, which he did. The spray "went off" and was knocked from Wickum's hand. The two men struggled until a second deputy arrived on the scene and helped Wickum subdue Oliva.

In checking the residence for victims and suspects, an officer observed two firearms in plain view and marijuana plants growing in an outbuilding. Other officers searched the house and found plastic baggies of marijuana, paraphernalia, marijuana plants, and firearms. Defendants were arrested.

After conducting the preliminary hearing, the court ruled the initial warrantless search was proper based on exigent circumstances that permitted the police to conduct a protective sweep of the premises, including the outbuildings. The court allowed admission as evidence of those items that were in plain sight during the sweep. Evidence found during a later, more detailed sweep was suppressed.

At a reconsideration motion, the court affirmed the decision to allow admission of the evidence found in plain sight.

3. Suppression Motion

Defendants both assert that the warrantless search was not justified by exigent circumstances or other exceptions. (*Mincey v. Arizona* (1978) 437 U.S. 385, 392.) The appellate standard of review for denial of a suppression motion is well-established: “We defer to the trial court’s factual findings where supported by substantial evidence, but exercise our independent judgment to determine whether, on the facts found, the search was reasonable under Fourth Amendment standards. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)” (*People v. Brown* (1998) 62 Cal.App.4th 493, 496.)

A claim of exigent circumstances depends on the particular facts of a case, such as the possible presence of additional suspects or potential victims or the threat of domestic violence. (*People v. Frye* (1998) 18 Cal.4th 894, 989-990; *People v. Higgins* (1994) 26 Cal.App.4th 247, 255; *People v. Wilkins* (1993) 14 Cal.App.4th 761, 772; *People v. Neighbours* (1990) 223 Cal.App.3d 1115; *People v. Keener* (1983) 148 Cal.App.3d 73, 77.)

Here substantial evidence supported the trial court's findings that a warrantless entry was justified because of police suspicions about the possibility of an injured or endangered third party. The volatility of the situation and the suggestion that someone else, other than Oliva or the children, may have been harmed or that the children might be in danger supplied such evidence. It was reasonable under the circumstances for the police, after arriving to help subdue Oliva, to conduct a protective sweep to locate the children and secure the house. During the lawful warrantless search, the police could seize the guns, marijuana, and marijuana plants found in plain sight. (*People v. Block* (1971) 6 Cal.3d 239, 243.)

Our review of the rejected reconsideration motion based on purported new evidence (§ 1538.5, subd. (i)) does not change the outcome because defendants failed to show the children could not have testified at the preliminary hearing. As defendants acknowledge, no effort was made to have the children testify previously; therefore, defendants' claim of new evidence fails.

4. Pitches Motions

The record reflects that defendant Oliva made four *Pitchess* motions. Our review of the sealed record confirms that the deputy's requested personnel records were produced for the court to review and the court determined they were not subject to discovery. Therefore, we reject any appellate challenge based on the court's *Pitchess* rulings.

5. Use of Marijuana Prohibited as a Condition of Probation

Oliva protests that he should be allowed to use marijuana while on probation for three years. Health and Safety Code section 11362.5, the Compassionate Use Act of 1996, permits the medical use of marijuana when prescribed by a physician. Defendant claims the trial court abused its discretion in imposing the probation condition that he neither use nor possess any controlled substance, including marijuana, because it is permitted under section 11362.5. We disagree.

Before sentencing, defense counsel filed a motion opposing prohibition of medical marijuana use and possession as a condition of probation. He cited a doctor's recommendation, first obtained in April 2000, that Oliva be allowed to use marijuana because he suffered from "partial tear L rotator cuff" and post-traumatic stress disorder as a Vietnam veteran. Counsel argued the condition that Oliva neither use nor possess marijuana as recommended by defendant's doctor was not a reasonable exercise of the court's discretion. The trial court disagreed because federal law prohibits such use and possession and because Oliva did not adequately show it was medically necessary for marijuana to be recommended as a treatment for defendant.

A trial court has broad, but not unlimited, discretion in setting the terms and conditions of probation. (§ 1203.1; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121; *People v. Welch* (1993) 5 Cal.4th 228, 233.) Therefore, we review for abuse of discretion. The California Supreme Court in *People v. Lent* (1975) 15 Cal.3d 481 (overruled on other grounds in *People v. Wheeler* (1992) 4 Cal.4th, 284, 290-292), established the rule on probationary conditions: "A condition of probation will not be

held invalid unless it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality’ [Citation.]” (*Lent, supra*, at p. 486.) All three factors must be present for a condition of probation to be invalid. (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 366.) Furthermore, “[i]nsofar as a probation condition serves the statutory purpose of ‘reformation and rehabilitation of the probationer,’ [citation] it necessarily follows that such a condition is ‘reasonably related to future criminality’ and thus may not be held invalid whether or not it has any ‘relationship to the crime of which the offender was convicted.’” (*People v. Balestra* (1999) 76 Cal.App.4th 57, 65.) A trial court does not abuse its discretion unless its determination is arbitrary or capricious or ““exceeds the bounds of reason, all of the circumstances being considered.”” (*People v. Welch, supra*, 5 Cal.4th at p. 234.)

Two cases have particular bearing on the issue here. In *People v. Bianco* (2001) 93 Cal.App.4th 748, exactly like in the present case, the defendant pleaded guilty to cultivating marijuana, and the trial court granted probation with a condition prohibiting him from using or possessing marijuana. Before sentencing, the defendant had obtained a physician’s recommendation for medical use of marijuana in compliance with Health and Safety Code section 11362.5. The Court of Appeal affirmed, holding that the condition was valid because it was closely related to the defendant’s offense and served the interests of reformation and rehabilitation by precluding future criminal conduct. The court pointed out that, notwithstanding California’s Compassionate Use Act, possession of marijuana remained a crime under federal law: “By imposing a condition of probation

prohibiting defendant from the possession or use of marijuana, the trial court was in effect ordering defendant to obey the law of the United States. Thus, the probation condition was reasonably directed at defendant's future criminality.” (*Bianco, supra*, at p. 753.) Essentially, in that case, both the majority and dissenting opinions recognized that the Compassionate Use Act does not override or nullify criminal federal law. (*Id.* at pp. 753, 755; *U.S. v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483; 21 U.S.C. § 844.)

Oliva ignores *Bianco* and relies on *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, holding a defendant may assert section 11362.5 as a defense to the sanction of revocation of his probation. (*Tilehkooh, supra*, at pp. 1437, 1440, 1443.) *Tilehkooh* is distinguishable from the instant case. Unlike here, the *Tilehkooh* defendant was already on probation with a probation term that allowed for the medical use of marijuana. Defendant was authorized to use medical marijuana under both California law and the terms of his probation. But the trial court attempted to revoke that condition of his probation retroactively because of the prohibition under federal law. The appellate court would not allow probation revocation on that basis because the state cannot enforce federal law.

We have examined the reasoning in *Bianco*, and adhere to it. First, possession of marijuana is illegal under federal law, which would violate the universal condition for probationers to obey all laws. Next, imposition of a probation condition forbidding the use and possession of marijuana is justified under the *Lent* test when reasonably related to future criminality. (*Bianco, supra*, 93 Cal.App.4th at p. 753.) Finally, conditions of

probation barring legal activity--such as consuming alcohol--are commonly upheld when related to the crime. A probation condition may regulate or prohibit otherwise lawful conduct that “is reasonably related to the crime of which the defendant was convicted or to future criminality.” (*Lent, supra*, 15 Cal.3d at p. 486.) In this case, defendant pleaded no contest to the charge of illegally cultivating marijuana, in exchange for which the People dismissed the remaining counts. Obviously, the crime of cultivating marijuana was directly and causally related to Oliva’s marijuana use and possession, thereby linking his possession to a California crime. The probation condition is directly related to his offense.

In conclusion, the condition of probation prohibiting Oliva from possessing or using marijuana is a proper exercise of the trial court’s discretion.

6. Disposition

We affirm the judgments against both defendants.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/McKinster
Acting P. J.

s/King
J.